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IN THE

Supreme Court of the United States

October Term, 1981

UNITED ENGINEERS & CONSTRUCTORS INC.,

and

BECHTEL POWER CORPORATION,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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Pursuant to Rule 22.5 of the Rules of the Supreme Court, Petitioners, United Engineers & Constructors Inc. ("United") and Bechtel Power Corporation ("Bechtel"), hereby submit this reply brief in support of their Petitions for a Writ of Certiorari.[1]

In their Petitions, United and Bechtel pointed out that this case has a far-reaching impact on all industries where union hiring halls are used and that the decisions of the courts below conflict with numerous other federal court decisions on the issues of vicarious liability, the need to find an employer guilty of a pattern and practice of discrimination before subjecting it to a mandatory injunction, and the applicability of Rule 23(b)(2) to defendant class actions.

1. The listings of United's and Bechtel's corporate parents, subsidiaries and affiliates as required by Supreme Court Rule 28.1 are contained in footnote 1 of their respective Petitions.

In their effort to persuade this Court to deny the Petitions filed by United and Bechtel, Respondents ignore several of Petitioners' arguments, misstate others, misrepresent the facts and issues in the case, and misinterpret the holdings of several cases. This reply brief will address only the more important of Respondents' misrepresentations.

I. Respondents' Misrepresentations of Fact Concerning Contractor Discrimination.

On page 4 of their brief, Respondents contend that Petitioners "are mistaken" in attributing solely to the Union the discrimination that occurred in this case, and argue that "the employers and contractor associations were far more than innocent bystanders." They then proceed to discuss, in five numbered paragraphs, several "facts" allegedly supporting their statements. Respondents' discussion of those "facts" is misleading and, in some cases, incorrect.

At the outset, we emphasize that the courts below did *not* find that the contractors committed or participated in any discriminatory conduct themselves. Rather, the District Court held the contractors "vicariously liable" for the *Union's* discrimination (JA. 196). Further, the District Court found that "plaintiffs have failed to show intent to discriminate by the employers as a class, and indeed have been unable to show knowledge or notice of discrimination by that class as a whole" (JA. 195).

Most of the evidence discussed on pages 4-6 of Respondents' brief pertains to the involvement of the contractor *associations*, not the contractors. The record in this case shows that the contractor associations represented only a small portion of the 1400 contractors in the defendant class. *See* JA. 29. Consequently, Respondents' attacks on the conduct of the associations have no bearing whatever on whether the individual non-member employers

were "more than innocent bystanders"; and there is simply no finding or basis in the record for Respondents' assertion that the associations were acting on behalf of the more than 1,000 employers who were not members of the associations.[2] Respondents' attempt to lump all contractors together, and to taint all with the conduct of associations to which the majority of contractors never belonged, merely underscores the fact that the action was not a proper defendant class action and that the defendant class members' due process rights were violated.

Respondents also err in stating that "the hiring hall itself represented a joint venture between Local 542 and all employers within its jurisdiction" (Respondents' brief at 6). The District Court made no such finding, and there is no basis in the record for such a finding. The collective bargaining agreements and the evidence show that the referrals from the hiring hall were made by the Union, and the District Court found the employers liable because of "the *union's* conduct in operating the hiring hall" (JA. 167) (emphasis added). There was neither evidence nor finding that the contractors had a "voice in the day-to-day control" over the hiring hall, and hence the hiring hall cannot be considered a "joint venture." **United States v. United Pacific Insurance Co.**, 545 F. 2d 1381, 1383 (9th Cir. 1976). Furthermore, as pointed out in United's Petition, but disregarded by Respondents, the exclusive hiring hall provision became a part of the industry contracts only as a result of the Union's lengthy and destructive strikes (JA. 23).

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2. Respondents' attempts to implicate all of the contractors because of the discriminatory conduct of the Joint Apprenticeship and Training Committee ("JATC") is even more misplaced. The courts below never found the contractors vicariously liable for the JATC's discrimination, and except for the miniscule number of contractors who had representatives among the trustees of the JATC, the contractors' only involvement with the JATC was to forward to it the contributions required under the collective bargaining agreements.

II. Respondents' Misstatements Regarding the Need to Decide Whether Section 1981 Requires Proof of Discriminatory Intent.

Respondents contend that this case does not present the question whether 42 U. S. C. § 1981 requires proof of discriminatory intent, because the contractors allegedly violated their "non-delegable" duty not to discriminate. This contention simply begs the question. The issue in this case is not whether the duty not to discriminate is "non-delegable," but whether the duty imposed on the contractors by section 1981 (even if "non-delegable") is solely a duty not to discriminate *intentionally*. In short, Respondents' assertion that the duty imposed by section 1981 is "non-delegable" ignores the fundamental question in this case, *i.e.*, the nature of the duty imposed by section 1981. As United and Bechtel established in their Petitions, the only duty imposed by section 1981 is the duty not to discriminate intentionally.

Respondents also argue that even if section 1981 does require proof of discriminatory intent, the discriminatory intent of the Union can be imputed to the contractors. This contention is likewise without merit. The only conceivable basis under which discriminatory intent could be so imputed would be if the Union were in fact the contractors' agent. For the reasons set forth in pages 13-14 of United's Petition and page 15 of Bechtel's Petition, there is no basis for holding that the Union was the contractors' agent, since the *sine qua non* for an agency relationship—the right to control—was completely lacking. Although Respondents' brief makes passing references to the Union as being the contractors' "agent," even Respondents do not dispute Petitioners' contentions that the existence of a right to control is a prerequisite to finding an agency relationship, that such right to control did not exist in this case, and that the National Labor Relations Act prohibits employers from attempting to control union hiring halls.

Accordingly, because an agency relationship did not exist between the Union and the contractors, the contractors can be held liable under section 1981 only if the District Court correctly construed that statute as permitting liability under the disparate impact theory and as imposing on the contractors an "affirmative duty" to prevent discrimination. *See* JA. 167, 183-86.

One other misrepresentation by Respondents should be noted. In footnote 13 of their brief, Respondents contend that Bechtel "conceded before the Third Circuit that it was unnecessary to resolve the issue of whether Section 1981 required proof of intentional discrimination."[3] That contention is not only wrong, but is completely mystifying. Seventeen pages of Bechtel's principal brief to the Court of Appeals were devoted to the argument that the District Court had erroneously concluded that proof of discriminatory intent was unnecessary under section 1981, and Bechtel reiterated that argument on pages 5-8 in its reply brief to the Court of Appeals and during oral argument before both the original panel and the court *en banc*. Thus, without question the issue of whether section 1981 requires proof of discriminatory intent is properly before this Court.

III. Respondents' Misstatements Pertaining to the Need to Examine the Employers' Individual Minority Utilization Statistics.

On pages 15-17 of their brief, Respondents characterize as "both procedurally and substantively flawed" Petitioners' argument that the courts below erred when, without evaluating the contractors' individual employment statistics, they held all defendant class members liable and ordered them to provide mandatory class-wide injunctive relief. Respondents again are merely attempting to divert the Court's attention from the issues in this case.

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3. Notably, Respondents do not contend that United made any such concession. Thus, they apparently agree that at least United may raise the § 1981 intent issue in this Court.

With respect to the alleged "procedural" flaw in Petitioners' argument, Respondents simply miss the point when they rely on the District Court's order bifurcating the trial into two stages. Petitioners do not challenge the bifurcation order. What United and Bechtel do challenge is the action of the courts below in imposing liability and injunctive relief at the end of Stage I without finding that the contractors held so liable and enjoined had engaged in a pattern and practice of discrimination. That action of the courts below is flatly inconsistent with this Court's decision in **International Brotherhood of Teamsters v. United States**, 431 U. S. 324 (1977), and with every other court of appeals decision we have found. *See* United's Petition at 14-16 and Bechtel's Petition at 17. Respondents cite no cases supporting the decisions below, other than clearly distinguishable cases which postponed until Stage II the question of individual monetary relief for the *plaintiff* class members. Those cases have no bearing on whether an employer can be ordered to provide class-wide prospective relief at the end of Stage I without review of its individual employment statistics.

Respondents' assertion of a "substantive" flaw has even less merit. They make the astonishing contention that "each employer individually violated Section 1981 regardless of the racial composition of its own workforce." However, they cite no case to support such a bizarre position, and their position is directly contrary to this Court's holding in **Teamsters**. Respondents' attempt to justify their position by arguing that "minorities did not have the same right as whites to contract for work as operating engineers" is simply wrong since, as Respondents themselves point out on page 3 of their brief, "no person affiliated with Local 542 or desiring entry into the craft is permitted to directly apply for work with an employer which is subject to a Local 542 contract." In short, the labor contracts required *all* employees—*white as well as black*—to go through the hiring hall before contracting directly with the employers. Whether the hiring hall was

manipulated or bypassed in such a way that blacks *in fact* were denied the same right as whites to work for United or Bechtel is a question that can be determined only upon analysis of those contractors' employment statistics—an analysis which the courts below considered unnecessary.

IV. Respondents' Misstatements Regarding the Defendant Class Certification Under Rule 23(b)(2).

In arguing that this Court should not consider the question whether a defendant class may properly be certified under Rule 23(b)(2), Respondents make a number of serious misrepresentations.

First, in footnote 10 of their brief, they contend that the District Court "held, in the alternative, that certification was proper under the provisions of Rule 23(b)(1)(A)." *See also* footnote 21. However, the portion of the record Respondents cite—JA. 140—contains the District Court's discussion of certification of the *plaintiff* class. At no point did the District Court sustain the applicability of subdivision (b)(1)(A) to the *defendant* class.

Moreover, the defendant class certification cannot be defended under Rule 23(b)(1)(A). That subdivision permits a class action where the prosecution of separate actions by or against individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Under the facts of this case, there is no basis for finding that inconsistent adjudications with respect to the defendant class members would establish incompatible standards of conduct for the *plaintiffs*, the parties opposing the defendant class.

Respondents' next misrepresentation is their statement that in **Lee v. Washington**, 390 U. S. 333 (1968), "this Court specifically rejected the very argument now raised by Petitioners" (Respondents' brief at 19). Respondents are simply wrong. Neither the opinion of this Court in **Lee**, nor that of the district court, nor the briefs filed with

this Court in that case, contains any discussion whatsoever of the applicability of subdivision (b)(2) to a defendant class.

Finally, Respondents erroneously contend that **Paxman v. Campbell**, 612 F. 2d 848 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 951 (1981), "is clearly distinguishable" (Respondent's brief at 20). Contrary to Respondents' assertion, the court of appeals in **Paxman** squarely held that a (b)(2) defendant class is improper as a matter of law:

> To proceed under 23(b)(2) against a class of defendants would constitute the plaintffs as "the party opposing the class" and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants appropriate. Wright and Miller, *Federal Practice and Procedure, Civil*, § 1775 at 21-22 (1972), states the proposition:
>
> > It should be noted that the injunctive relief must be sought in favor of the class. As a result, an action to enjoin a class from pursuing or failing to pursue some course of action would not fall under Rule 23(b)(2) and would have to qualify under Rule 23(b)(1) or Rule 23(b)(3) in order to be given class action treatment.

612 F. 2d at 854. The court concluded: "We therefore hold that the district court erred in certifying this case as a class action under Rule 23(b)(2) . . ." *Id.*

Respondents' reliance on footnote 9 of the **Paxman** opinion[4] is misplaced. The portion of the footnote on

4. The entire text of footnote 9 is as follows:

Our holding in no way prevents the utilization of Rule 23(b)(2) in cases in which a class of plaintiffs brings suit against more than one *named* defendant, each one of which has taken like action affecting directly the individual members of the plaintiff class. See *East Texas Motor Freight v. Rodriquez*, 431 U. S. 395, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977); *Hill v. Western Electric Co., Inc.*, 596 F. 2d 99 (4th Cir. 1979). Indeed, an

which Respondents rely appeared in the context of the **Paxman** court's reaffirmance of the propriety of a (b)(2) *plaintiff* class action against several *named* defendants. Moreover, the last paragraph of the footnote was at most merely an alternative holding which has no applicability to the question of the propriety of a *(b)(2)* defendant class, but rather seems more directed to the absence of the commonality and typicality required by Rule 23(a)(2) and (3).

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4. (Cont'd.)

intention of the rule was to facilitate class action treatment in the civil rights area, such as where, for example, an employer and a union are joined as defendants in a complaint alleging racial discrimination in employment. See *Wright, supra,* § 1775.

In this case, in contrast, more than 130 different school boards were free to adopt maternity leave policies of entirely unknown differences or similarities. It is uncontradicted that there was no state-wide policy in force, centrally directed or otherwise. (Emphasis in original).

V. Conclusion

For the foregoing reasons, Respondents' arguments in opposition to the Petitions for a Writ of Certiorari should be rejected. Moreover, Respondents have not even addressed several of the major reasons advanced by United and Bechtel in support of their Petitions, *e.g.*, the importance of the case for the entire construction industry and the clear conflict among the courts on the question of contractor liability for a union's discriminatory referral practices. Accordingly, United and Bechtel respectfully request this Court to grant their Petitions.

Respectfully submitted,

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